RECENT CASE NOTES

ACCORD AND SATISFACTION—LIABILITY OF THE DEBTOR ON AN EXECUTORY ACCORD.—The defendant agreed to purchase certain galvanizing equipment from the plaintiff. Before the plaintiff had completed the work thereon according to the agreement, the defendant requested the cancellation of the order. The plaintiff refused, but offered to accept two thousand dollars in satisfaction of the unliquidated claim in return for the defendant's promise to pay such sum. The defendant duly accepted the plaintiff's offer but later refused to pay as agreed. The plaintiff sued on the new agreement. *Held,* that the plaintiff could recover. *Meaker Galvanizing Co. v. McInnes* (1922, Pa.) 116 Atl. 400.

In the instant case, the court dealt with the old contract as having been broken by the defendant, not as having been rescinded before breach, and therefore the new agreement was an accord. Even after bilateral contracts became enforceable, courts were reluctant to enforce bilateral accords. "Upon an accord no remedy lies." *Lynn v. Bruce* (1794, C. P.) 2 H. Bl. 317. This statement is still repeated, although it is now incorrect. *Bell v. Pitman* (1911) 143 Ky. 521, 136 S. W. 1026; Leake, *Contracts* (6th ed. 1912) 643. Even though no court has expressly repudiated this statement, the decisions are almost universally inconsistent with it. *Nash v. Armstrong* (1861) 10 C. B. (N. S.) 259; *Very v. Levy* (1851, U. S.) 13 How. 345; *Moers v. Moers* (1920) 229 N. Y. 294, 128 N. E. 202; (1920) 30 YALE LAW JOURNAL, 98. A sufficient consideration is as essential in an accord as in any other contract. *Partridge Lumber Co. v. Phelps-Burruss Lumber Co.* (1912) 91 Neb. 396, 136 N. W. 65. In an accord the determining factor is whether it was the intention of the parties that the new promise, or performance of that promise, should operate as a discharge of the pre-existing claim. An executory accord which provides that actual performance of the new agreement shall operate as a discharge will not bar an action on the old contract. *Hosler v. Hursh* (1892) 151 Pa. 415, 25 Atl. 52; (1917) 26 YALE LAW JOURNAL, 789. In such a case, the creditor could elect to sue on the accord. *Hunt v. Brown* (1888) 146 Mass. 253, 15 N. E. 587; 3 Williston, *Contracts* (1920) 3170. Where it is clearly shown, however, that the parties intended instantly to discharge the former contract, the new executory agreement is a complete defense to an action on the original claim. *Good v. Cheesman* (1831, K. B.) 2 Barn. & Adol. 328; *Nassoiy v. Tomlinson* (1896) 148 N. Y. 326, 42 N. E. 715. In the instant case, the court said that an agreement to accept a smaller sum in satisfaction of a claim for a larger sum is an accord, so far revocable as not to bar suit on the original contract until satisfied by actual and complete performance. Although this statement seems untenable, the decision is sound.

BANKS AND BANKING—GUARANTY FUND—CERTIFICATES OF DEPOSIT ISSUED BY CASHIER FOR PERSONAL BENEFIT NOT PROTECTED.—The plaintiff was a holder in due course of certificates of deposit for which no funds had been deposited, the certificates having been issued by the cashier of the bank for his personal benefit. The bank became insolvent and the plaintiff brought an action to recover the amount of the certificates from the depositors' guaranty fund. Kan. Gen. Sts. 1915, ch. 11, art. 2. *Held,* that the plaintiff could not recover. *Fourth Nat. Bank v. Wilson* (1922, Kan.) 204 Pac. 715.

Statutes establishing depositors' guaranty funds to insure bank depositors against losses are constitutional. *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 31 Sup. Ct. 186; *Assaria State Bank v. Dolley* (1911) 219 U. S. 121, 31 Sup.

Ct. 189. Under such statutes every bank must make an initial contribution to the guaranty fund and pay annual assessments proportionate to its deposits. When a bank becomes insolvent the state assumes control and out of the guaranty fund completely discharges the claims of the depositors. Kan. Gen. Sts. 1915, ch. 11, secs. 596-598. The state then becomes a preferred creditor for the amount paid to the depositors, having a prior lien on the bank's assets. *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.* (1912) 33 Okla. 535, 126 Pac. 556; *contra, Anderson v. Baskin & Wilbourn* (1917) 114 Miss. 81, 74 So. 682. Deposits "otherwise secured" are not guaranteed under these acts. Kan. Gen. Sts. 1915, ch. 11, sec. 600; *Austin v. First Nat. Bank* (1918, Tex. Civ. App.) 205 S. W. 839 (deposit secured by a bond); *American State Bank v. Wilson* (1922, Kan.) 204 Pac. 709 (certificate of deposit endorsed personally by bank president.) Money loaned to a bank and not credited to the depositor's current account is not considered as a deposit, and therefore is not protected. *Iams v. Farmers' State Bank* (1917) 101 Neb. 778, 165 N. W. 145 (bank paid a bonus to secure the money); *Lankford v. Schroeder* (1915) 47 Okla. 279, 147 Pac. 1049; *contra, Farrens v. Farmers' State Bank* (1917) 101 Neb. 285, 163 N. W. 318 (bank director made deposit to help bank meet its obligations). A deposit may be effected by giving to one bank credit, subject to check or draft, in another bank. *American State Bank v. Wilson, supra.* But, as the instant case indicates, money or the equivalent of money must be placed in or at the command of the bank in order to satisfy the statute. Hence a bona fide purchaser of a certificate of deposit which has not been issued under such circumstances has no better claim on the guaranty fund than the original payee. It seems that the statute impairs the negotiability of certificates of deposit and this interpretation may have the effect of making them less acceptable in commercial dealings.

BUSINESS TRUSTS—PARTNERSHIP LIABILITY OF SHAREHOLDERS—POWER TO AMEND TRUST AGREEMENT.—The defendants were shareholders in a company organized in the form of a business trust, under the terms of which the legal title to all property and the exclusive management and control of the business were given to the trustees, who had authority neither to bind the shareholders nor to act as their agents. The shareholders reserved the power to amend the trust agreement in a meeting. The plaintiffs sued on a contract signed by the trustees. *Held,* that the shareholders were individually liable, as the association was not a trust. *McCamey v. Hollister Oil Co.* (1922, Tex. Civ. App.) 241 S. W. 689.

In a business trust the liability of the shareholders as partners depends on whether under the terms of the trust agreement the trustees may be considered as the agents of the shareholders. Judah, *Possible Partnership Liability Under the Business Trust* (1922) 17 ILL. L. REV. 77, 78; Sears, *Trust Estates as Business Companies* (2d ed. 1921) 108. It is well settled that the trustee of the ordinary trust, such as the trust created by will, is not an agent of the *cestui que trust,* and that the latter is not liable for the torts or debts incurred in the administration of the estate. Scott, *Liabilities Incurred in the Administration of Trusts* (1915) 28 HARV. L. REV. 725, 736. When the beneficial owners of property under a trust agreement have supervision and control over the acts of the so-called trustee, it is not a true trust and the beneficiaries are liable as principals, even though the trust agreement expressly stipulates against such liability. *Industrial Lumber Co. v. Texas Pine Land Association* (1903) 31 Tex. Civ. App. 375, 72 S. W. 875; Wrightington, *Unincorporated Associations* (1916) 47. The English courts have been liberal in allowing the beneficiaries to exercise control as long as the actual management of the business was carried on by the trustees. Thus no partnership liability was imposed where the shareholders had power under the trust agreement to hold meetings, elect trustees, make rules for the conduct of the business, or